No. 13115

In The

United States Court of Appeals

For the Ninth Circuit

R. M. PERRIN and MARY PERRIN, *Appellants*,

vs.

ALUMINUM COMPANY OF AMERICA and C. S. THAYER,

Appellees.

Brief of Appellant

Appeal from the United States District Court for the Western District of Washington, Southern Division.

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JURISDICTIONAL STATEMENT

This is an action in tort commenced in the Superior Court of the State of Washington in and for Clark County by R. M. Perrin, a citizen and resident of Oregon, and Mary Perrin, a citizen and resident of Washington, against Aluminum Company of America, a corporation created under the laws of Pennsylvania and a citizen and resident of that state, and C. S. Thayer, a citizen and resident of Washington. The amount in controversy, after excluding interest and costs, exceeds the sum of $3000.00 (R 3-5).

The action was removed to the United States District Court for the Western District of Washington, Southern Division (R-19) and an order was entered in the District Court denying plaintiffs' motion to remand (R-27). Judgment was entered in favor of defendants on their motion to dismiss the action on the ground that it was barred by the statute of limitations (R 29). Plaintiffs' appeal to this Court was dismissed (R 48, 49) and judgment on the Mandate was entered in the District Court (R 48). An order was thereafter entered in the District Court denying plaintiffs' motion to vacate the order denying remand, the final judgment and the judgment on the mandate (R 53). From that order this appeal has been taken to this Court (R 55) which has jurisdiction of the appeal under 62 Stat. 929, 28 U.S.C.A., Sec. 1291 (1948).

STATEMENT OF THE CASE

Plaintiffs commenced this action in the Superior Court of the State of Washington in and for Clark County on June 7, 1950 to recover damages for injuries done by defendants to their crop of 27 acres of gladioli bulbs and flowers grown on leased lands in Multnomah County, Oregon in 1947 (R 3). Plaintiffs contend that the injuries and damages to their property were caused by defendants' willful and wrongful acts in depositing noxious gases, fumes and particulates upon the property

occupied by plaintiffs and upon the crops grown thereon.

On June 23, 1950 defendant Aluminum Company of America attempted to remove this action into the United States District Court for the Western District of Washington, Southern Division. Defendant Aluminum Company of America in its Petition for Removal, and affidavits in support thereof, admitted that C. S. Thayer was a resident of Washington (R 10) and that he was Works Manager of its plant when the cause of action arose (R 14) but alleged that he was improperly and fraudulently joined (R 10) for the purpose of avoiding and defeating the jurisdiction of the Courts of the United States.

On July 5, 1950 plaintiffs filed their motion to remand and the affidavit of James C. Dezendorf (R 23, 24). Said motion and affidavit traversed the allegations made by defendant Aluminum Company of America that defendant Thayer was fraudulently and improperly joined. On July 17, 1950 plaintiffs filed the affidavit of R. M. Perrin which asserted that plaintiff Mary Perrin was a resident and citizen of Washington (R 26, 27).

An issue of fact was thus presented to the Court in regard to the joinder of defendant C. S. Thayer. Based upon the affidavits filed by both parties, and without

any testimony, the Court proceeded to determine this vital factual issue.

We are not enlightened as to the Court's findings in that regard since the record is barren of any finding of fact upon that issue. The basis and reasons for the Court's decision can be found nowhere in the record. Without indicating its finding, the Court entered its order denying plaintiffs' motion to remand on September 18, 1950 (R 27).

Both defendants next appeared in the District Court on October 20, 1950 and moved the Court for an order dismissing plaintiffs' action on the ground that the action was barred by the statute of limitations (R 28). On December 8, 1950 the District Court entered its judgment order dismissing this action (R 29).

On Saturday, January 6, 1951 at 12:10 P.M. plaintiffs deposited in the main post office at Portland, Oregon their notice of appeal and bond, with postage prepaid, addressed to the Clerk of the United States District Court for the Western District of Washington, Southern Division, at Tacoma, Washington (R 44). On the same date copies of plaintiffs' letter of transmittal of said notice of appeal were mailed, postage prepaid, to defendants' attorneys Hart, Spencer, McCulloch, Rockwood & Davies, 1410 Yeon Building, Portland, Oregon and Metzger, Blair, Gardner & Boldt, Tacoma Building,

Tacoma, Washington (R 44). On December 6, 1950 the bond on said appeal was served upon defendants' attorneys (R 44).

The time for filing an appeal from the judgment of December 8, 1950 expired on Monday, January 8, 1951. In the normal course of the mails plaintiffs' notice of appeal should have left Portland on Train 459 at 5:00 P.M., January 6, 1951 (R 45). The mail from that train normally arrives in Tacoma at 8:00 P.M. and is immediately distributed (R 46). The District Court is located in the Post Office Building and receives its mail at a Post Office box (R 40, 41). Plaintiffs' notice of appeal should have been delivered to the District Court's box at 8:00 P.M. on January 6, 1951. Subsequently there were nine trains from Portland which arrived in Tacoma in time for mail to be delivered to the Clerk of the District Court at or before 2:30 P.M. January 8, 1951 (R 45).

The Deputy Clerk of the United States Court for the Western District of Washington, Southern Division, E. E. Redmayne, stated on February 1, 1951 that his office had not been in the practice of removing mail from its box in the afternoon and that if the letter containing plaintiffs' notice of appeal and bond on appeal had been delivered Monday afternoon, January 8, 1951 it would not have been opened by his office until the

next day, Tuesday, January 9, 1951 (R 40, 41). Three trains arrived in Tacoma from Portland on January 8, 1951 from which mail would have been delivered to the Clerk of the District Court at 2:30 P.M. on that date (R 45).

Plaintiffs' notice of appeal bears the Clerk's filing stamp dated January 9, 1951 (R 31). However, the Clerk has admitted that if it had been delivered in the afternoon of January 8, it would probably not have been stamped until the following morning (R 41).

Defendants moved to dismiss plaintiffs' appeal on the ground that it was not timely filed. On April 9, 1951 defendant's motion was granted by this Court and on May 14, 1951 this Court issued its mandate based thereon. On May 17, 1951 that mandate was entered of record in the District Court (R 47). On June 8, 1951 the District Court entered its Judgment on Mandate affirming its judgment of December 8, 1951 (R 50).

On July 17, 1951 plaintiffs filed their motion (1) to vacate the order of the District Court denying plaintiffs' motion to remand, (2) to vacate the judgment of the District Court entered December 8, 1950, (3) to vacate the judgment of the District Court entered June 8, 1951 and (4) to remand this action to the Superior Court of the State of Washington in and for Clark County (R 52).

In urging that motion plaintiffs relied upon Rule 60 of the Federal Rules of Civil Procedure following Title 28 U.S.C.A. Sec. 2072. It was pointed out to the Court that at the hearing on the motion to remand a factual issue had been raised and that a determination of that issue was necessary to the Court's decision, but that no findings of fact had been made by the Court. It was further called to the Court's attention that based upon the affidavits on file herein, which constituted all the evidence on the matter, the Court could not conceivably have made any findings which would have supported its decision. Because of that irregularity in the proceeding and because of the inadvertent and excusable failure of plaintiffs' bona fide attempt to take an appeal, the District Court should have reviewed and vacated its previous decision.

Due to Judge Leavy's illness Judge McLaughlin heard argument on the matter and on August 3, 1951 he entered his order denying plaintiffs' motion (R 53). The record does not indicate the basis for the Court's decision but the statement was made by the Court that it did not feel that it had the authority to overrule the decision by a judge of coordinae jurisdiction.

On August 25, 1951 plaintiffs filed their notice of appeal and bond on appeal (R 55, 56).

Plaintiffs contend that the District Court erred in its failure to determine the facts in regard to the joinder of defendant C. S. Thayer and that if findings of fact had been made in regard to that issue it could not, and would not, have found any basis for the conclusion that plaintiffs had joined defendant Thayer without any intention to prosecute the matter to final judgment against him. What actually occurred was that the District Court made no finding at all upon this decisive issue. As announced from the Bench the District Court based its decision upon an entirely separate and distinct issue, wholly immaterial to the main issue,—that defendant Thayer was not liable to plaintiffs. Plaintiffs contend that this finding was not only wholly unrelated to the issue to be decided on the motion to remand but was one which the District Court had no authority to make at that stage of the proceeding.

Secondly, plaintiffs contend that the District Court erred in holding that plaintiffs' claim was barred by the Statute of Limitations in that it failed to apply Oregon law in regard to the nature of plaintiffs' right which they claim was violated by defendants. The tort having occurred in Oregon, under well-settled conflict of laws rules, the law of Oregon is determinative of the nature of the right. Under Oregon law the wrong committed against the growing crop of plaintiffs on their leased

land constituted "an action for the taking, detaining, or injuring personal property." The Washington three-year statute rather than the two-year statute of limitations applies to this type of action. Plaintiffs do not urge this point on appeal for any purpose other than to point out that plaintiffs' claims are not barred by the statute of limitations.

Third, plaintiffs contend that the District Court had authority under Rules 60 and 63 of the Federal Rules of Civil Procedure following Title 28 U.S.C.A. Sec. 2072, and under its inherent power, to correct the erroneous impressions of fact received by the Court during the remand proceedings.

Finally, plaintiffs contend that the laxity of the Clerk, the likelihood that the notice of appeal and bond on appeal actually were delivered prior to the expiration of the time for appeal, and the bona fide attempt by plaintiffs to take an appeal two days before the time for appeal expired made this a unique situation where the demands of justice required the District Court to exercise its inherent power to correct its own errors.

SPECIFICATION OF ERROR

The District Court erred in denying plaintiffs' motion (1) to vacate and set aside the order entered in this action on September 18, 1950, (2) to vacate and

set aside the judgment entered in this action on December 8, 1950, (3) to vacate and set aside the judgment entered in this action on June 8, 1951 and (4) to remand this case to the Superior Court of the State of Washington in and for Clark County.

SUMARY OF ARGUMENT

I

This action was not removable from the State Court.

A. The requisite diversity of citizenship required as a condition precedent to the jurisdiction of the District Court in a controversy of the character presented by the record in this cause does not exist.

B. No separate independent claim is stated against either defendant so that neither of them can remove all or any part of this action.

C. An action in which a resident defendant is a proper party may not be removed.

II

The District Court's failure to find the facts in regard to the joinder of defendant C. S. Thayer was an irregularity which justified vacation of the order denying remand.

A. Findings of Fact should have been made and entered by the District Court.

B. The erroneous ruling would not have occurred if the District Court had made and entered Findings of Fact.

C. The District Court had the power to vacate its order and judgment erroneously entered.

III

The District Court failed to apply Oregon Law, as it should have done under well-settled conflict of laws rules, on defendants' motion to dismiss on the ground that the action was barred by the statute of limitation.

IV

The refusal of the District Court to vacate its prior orders and judgments and to remand the action denied plaintiffs the remedy to which they were entitled and constituted an abuse of discretion.

ARGUMENT

I

This action was not removable from the State Court.

A. Diversity of citizenship is not present.

Plaintiff Mary Perrin is a resident and citizen of the State of Washington (R 26, 27). Defendant C. S. Thayer is also a resident and citizen of the State of Washington (R 10, 24). Thus the controversy is not one

wholly between citizens of different states and the action cannot be removed. 62 Stat. 930, 28 U.S.C.A. Sec. 1332 (1948).

B. Since no separate independent claim is stated against either defendant, neither of them can remove the case. The record indicates that there is no separate and independent cause of action which would justify removal under 62 Stat. 938, 28 U.S.C.A. Sec. 1441 (c) (1948).

C. Since C. S. Thayer is a resident defendant, the action may not be removed.

No Federal Question is involved and since C. S. Thayer is a resident defendant, properly joined and served with process prior to the filing of the petition to remove, the case cannot be removed. 62 Stat. 938, 28 U.S.C.A. 1441(b) (1948).

II

The District Court failed to find the facts in regard to the alleged fraudulent joinder of defendant Thayer. The failure to make findings of fact on an important issue was an irregularity justifying vacation of the order denying remand.

A. Findings of Fact should have been made and entered by the Court in regard to the issue of fraudulent joinder.

Rule 52, Federal Rules of Civil Procedure, requires that the Court enter Findings of Fact in regard to all actions tried upon the facts without a jury or with an advisory jury. The purpose of this Rule is to require findings on all factual issues.

In Ilsen and Hone, *Federal Appellate Practice as Affected By The New Rules of Civil Procedure*, 24 Minn. L. Rev. 1, 21 (1939) (quoted with approval in the Commentaries following Rule 52, Fed. R. Civ. P. following Title 28 U.S.C.A. Sec. 2072) the authors explain the rule as follows:

> "It has been stated that under the Rules the distinction is between jury and non-jury actions instead of between law and equity; it would seem more accurate to say that the new distinction is between jury and non-jury issues rather than actions; for if the word 'action' in Rule 52 (a) is construed literally, the situation will then arise that there will be no findings of fact on some material issues in actions where as to particular issues a jury trial has been demanded. This result would be inconsistent with one of the purposes of Rule 52 (a) for in those cases what constituted the grounds of the trial court's judgment would not be readily apparent to the appellate courts. * * * Hence Rule 52(a) should be construed to require findings on the court tried issues even though part of the issues in an action are tried to a jury. * * *".

Rules 38 and 39 Fed. R. Civ. P. speak primarily of issues and expressly contemplate that in a single action some issues may be tried by a jury while others are tried by the court. In a case where some of the issues are tried by the court and others by the jury the clear intent of the Rules is that Findings of Fact will be made in regard to the court-tried issues. Any other result would be inconsistent with the purposes of the Rules.

In providing that findings of fact "are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)" the purpose was to except from the requirements of Rule 52(a) Fed. R. Civ. P. decisions made solely upon matters of law. There is no indication in the Rules that any factual issues determined by the court are to be excluded from the application of Rule 52(a), Fed. R. Civ. P.

Professor Moore at 5 *Moore's Federal Practice* (2d Ed.) P. 2652 has this to say about the purpose of Rule 52, Fed. R. Civ. P.:

> "An examination of Rule 52(a) discloses that its objective is to have the trial judge set forth his findings of fact and conclusions of law in cases where he is the trier of the fact (including cases where he utilizes an advisory jury) where his decision turns in part upon a factual determination."

At 5 *Moore's Federal Practice* (2d Ed.) p. 2673, Professor Moore comments as follows in regard to the necessity of findings on all factual issues:

> "The first five defenses enumerated in Rule 12(b), which may be made by motion, are: '(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process.' Insofar as a motion raising any or all of these defenses raises only a question of law, the district court need make no findings, even though the motion is sustained and the action is dismissed. But how stands the matter if the district court must determine the facts in ruling on such a motion? In *King v. Wall & Beaver Street Corp.* [145 F. 2d 377, 381 (App. DC 1944)] the defendant's objection to improper venue raised issues of fact, in addition to questions of law; a preliminary hearing was had pursuant to Rule 12(d); and the district court made findings. Judge Groner, for the Court of Appeals of the District of Columbia stated:
>
> > 'Such preliminary hearings are not summary proceedings, but are separate trials of separate issues. * * * Consequently, the court was fully justified, indeed, was required, to make findings of fact.'

Although the literal language of the 1946 amendment stating that findings are unnecessary on decisions of motions under Rule 12 may obviate the above decision, made prior to the 1946 amendment, we do not believe that it should for two reasons. The 1946 amendment should be read in conjunction and harmonize with the earlier provision of the Rule requiring findings in all actions 'tried upon the facts'; and the reasons for findings of fact are equally pertinent to this proceeding."

In *Smith v. Southern Pacific Co.*, 187 F. 2d 397, 400, (9th Cir. 1951) cert. denied, 96 L. Ed. Adv. Op. No. 1, p. 31, this court commented upon the fact that the record failed "to reveal any finding of fact by the trial court on the questions of fraudulent joinder" and implied that such finding should be made when the question of fraudulent joinder is raised. The same implication is found in *Wells v. Missouri Pac. R. Co.*, 87 F. 2d 579, 581 (8th Cir. 1937).

Defendants admitted that defendant C. S. Thayer was Works Manager at the time the alleged wrongful acts were committed (R 14). However, they contended that plaintiffs had fraudulently joined him with knowledge that he had no control or supervision of defendant Aluminum Company of America's plant and that only the non-resident officers of the defendant corporation had authority in the control and supervision of the plant. Plaintiffs denied those allegations and asserted that defendant Thayer had supervision and control of the aluminum plant.

The factual question to be determined in the removal proceedings was not whether defendant Thayer was liable to plaintiffs, but whether plaintiffs thought he was liable and intended to secure a joint judgment against both defendants. No oral testimony was introduced and the entire record is before this Court. Based

upon the record, no evidence whatsoever is available to support a finding that plaintiffs did not intend to obtain a joint judgment against both defendants. Had this issue been passed upon by the Court, it is inconceivable that it would have found any basis for defendants' allegation that defendant Thayer had been fraudulently joined as a defendant.

The questions to be determined on removal were: (1) whether there was a real intention to get a joint judgment and (2) whether there was a colorable ground for it shown as the record stood when the case was removed. *Smith v. Southern Pacific Co.*, 187 F. 2d 397, 401 (9th Cir. 1951), cert. denied, 96 L. Ed. Adv. Op. No. 1, p. 31, *Chicago R. I. & Pac. R. Co. v. Schwyhart*, 227 U. S. 184, 194 (1913).

It is apparent from an examination of the complaint that a cause of action was stated against both defendants. It has never been contended by defendants that the complaint failed to state a cause of action against either defendant and that issue was not raised in the District Court.

Appellants concede that whether the complaint states a cause of action against defendant Thayer is to be determined by the law of Washington. However, the nature and extent of liability is governed by the law of Oregon where the tort occurred. *Young v. Masci*, 289

U. S. 253, 258 (1933); *Richardson v. Pacific Power & Light Co.*, 11 Wash. 2d 288, 299; 118 P. 2d 985, 991 (1941); *Mountain v. Price*, 20 Wash. 2d 129, 132, 146 P. 2d 327, 328 (1944).

In Oregon all persons engaged in the commission of a tort are wrongdoers and no one of them can excuse himself on the ground that he acted as the agent of another. *Riesland v. Schick*, 111 Or. 42, 46, 224 Pac. 827, 828 (1924); *Clarkson v. Wong et al*, 150 Or. 406, 412, 42 P. 2d 763, 765, 45 P. 2d 914 (1935). 20 A.L.R. 109. 99 A.L.R. 410. It is admitted that defendant Thayer was Works Manager of defendant Aluminum Company of America's plant at the time the cause of action arose (R 14), and it is a universal rule that the manager or supervising agent is personally liable for his torts committed under the direction or command of his principal, *Duncan et al v. Flagler*, 19 Okla. 18, 20, 132 P. 2d 939, 941 (1942); 2 *Am. Jur.* p. 257 Agency Sec. 326, and that an officer or agent of a corporation is personally liable for trespasses committed by him or under his direction. *3 Fletcher, Cyclopedia of the Law of Private Corporations*, p. 775 Sec. 1163; 13 *Am. Jur.* p. 1049 Corporations Sec. 1123. It is, of course, immaterial that the injury was removed by time and space from the commission of the wrongful act. *Brown v. Jones*, 130 Or. 424, 432, 278 Pac. 981, 983 (1929); *Cartwright v. Southern*

Pacific Co., 206 Fed. 234, 235 (D. Ore. 1913); *Western Union Teleg. Co. v. Bush*, 191 Ark. 1085, 1090; 89 S. W. 2d 723; 725 (1935).

The only issue before the District Court on the removal proceedings was whether there was a real intention to secure a joint judgment. That matter was put squarely in issue by the allegations in defendants' removal petition and supporting affidavits and the denial thereof by plaintiffs.

It necessarily follows that the District Court should have determined the facts in regard to the issue of fraudulent joinder and should have entered Findings of Fact recording its findings.

B. The erroneous ruling would not have occurred if the District Court had made Findings of Fact.

The record does not indicate the finding of the Court in regard to the issue of fraudulent joinder and the fact is that no finding on that issue was announced by the Court. The only pronouncement from the Court was to the effect that it did not believe that defendant Thayer would be found liable. Obviously that is an entirely different issue from the one presented to the Court upon the motion to remand.

If the District Court had entered findings it would have been apparent that no determination had been

made of the issue involved in the removal proceedings. The matter would have been clarified by the necessity of putting into writing the issue and the Court's determination of it. An excellent statement of the purposes to be served by filing findings of fact is found in *United States v. Forness et al*, 125 F. 2d 928, 942 (2nd Cir. 1942), *cert. denied*, 316 U. S. 694 (1942) (cited with approval by Advisory Committee in its 1946 Note following Rule 52, Fed. R. Civ. R. following 28 U.S.C.A. Sec. 2072) where Judge Frank comments in this fashion:

> "It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty. Often a strong impression that on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. The trial court is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts. When a federal trial judge sits without a jury, that responsibility is his. And it is not a light responsibility since, unless his findings are 'clearly erroneous', no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be."

The same view is expressed in 5 *Moores Federal Practice* (2d Ed.) p. 2653 where the following is found:

> "The purpose of findings of fact is three fold: as an aid in the trial judge's process of adjudication; for purposes of res judicata and estoppel by judgment; and as an aid to the appellate court on review."

C. The failure to make findings of fact in regard to the issue of fraudulent joinder was an irregularity which justified vacation of the order denying remand and the subsequent judgments entered in the District Court.

Rule 52, Fed. R. Civ. P. is mandatory and requires that the District Court enter findings in every proper instance. *United States v. Aluminum Company of America*, 2 F. R. D. 224, 231, (S.D.N. Y. 1941).

In 2 Barron & Holtzoff, *Federal Practice & Procedure*, p. 810, the following is found: "Rule 52 (a) requiring the trial court to find the facts specially and state separately its conclusions of law is mandatory and must be fairly observed."

In this case there was not only an irregularity in the failure to enter findings, but no findings were made upon the issue presented to the court. The court would have been justified in correcting the error thus resulting.

United States v. Geisler, 9 Fed. Rules Serv. 60b, 51, Case 2, p. 911. The District Court has authority under Rule 60b Fed. R. Civ. P. to vacate judgments whenever such action is appropriate to accomplish justice. *Klapprott v. United States,* 335 U. S. 601, 614 (1949).

Finally, the Court has inherent power to correct its own decisions. *Bucy v. Nevada Const. Co.,* 125 F. 2d 213, 216 (9th Cir. 1942); *McGinn v. United States,* 2 F. R. D. 562, 564, (D. Mass. 1942).

Before the adoption of the rules it was often said that the Court had unlimited power to correct its judgments during the term at which they were rendered. Freeman, *Law of Judgments* (5th Ed.) p. 376. With the abolition of the effect of terms by Rule 6, Fed. R. Civ. P. that power would seem to exist for at least one year after the judgment under the provisions of Rule 60.

When this matter was brought to the District Court's attention upon the motion to vacate it was obliged to correct the error into which it had been misled and should have determined for itself the facts in regard to fraudulent joinder. At that time it was pointed out that the Court had not previously passed upon this issue and had entered no findings. The District Court refused to consider the factual issue and denied the motion on the ground that it did not have authority to pass upon the ruling of another District Judge despite the express

provisions covering such a situation in Rule 63, Fed. R. Civ. P.

III

The action is not barred by the Statute of Limitations. The District Court should have applied Oregon law in regard to the nature of the wrong done to plaintiffs. *Young v. Masci*, 289 U. S. 253, 258 (1933); *Richardson v. Pacific Power & Light Co.*, 11 Wash. 2d. 288, 289; 118 P. 2d 985, 991 (1941); *Mountain v. Price*, 20 Wash. 2d 129, 132; 146 P. 2d 327, 328 (1944).

The injury to plaintiffs' property — damage by fumes, gas and particulates to growing crops on land leased and occupied by plaintiffs — occurred in Oregon and under Oregon law constituted an injury to personal property which is governed by the Washington three-year statute of limitations.

The Washigton three-year statute includes "an action for taking, detaining, or injuring personal property." Rem. Rev. Stat. Sec. 159. It has been held in Oregon that an action for damage to growing crops on leased lands is "an action for taking, detaining or injuring personal property." *Brown v. Jones*, 130 Or. 424, 278 Pac. 981 (1929). In that case plaintiffs' growing crops on lands leased by him were injured by flooding waters which were discharged onto his property. No

valid distinction can be drawn between invasions by water and invasions by gases, fumes and particulates.

Since it is clearly established in Oregon that this type of action is one for "taking, detaining or injuring personal property" it necessarily follows that it should be governed by the Washington three-year statute and consequently the action is not barred by the statute of limitations.

IV

The refusal of the District Court to grant plaintiffs' motion to vacate its order denying remand and its subsequent judgments and to remand this case constituted an abuse of discretion.

Although the vacation of orders and judgments under Rule 60, Fed. R. Civ. P. is a matter within the sound discretion of the District Court, such discretion must not be exercised in an arbitrary or capricious manner. *Chicago & N. W. Ry. Co. v. Davenport*, 95 F. Supp. 469, 471 (S. D. Iowa 1951). When it was brought to the Court's attention, on the motion to vacate, that the factual issue in the removal proceeding had not been passed upon it was incumbent upon the Court to re-examine the matter. Plaintiffs requested a finding of fact and not a review of matters of law.

It was contended by defendants below that plaintiffs desired a review of the law after the time for appeal had expired. Such is not the case. Plaintiffs desire that the Court correct its erroneous impression of the facts. Such a correction is authorized by Rule 60(6) Fed. R. Civ. P. Formerly writs of coram nobis and coram vobis permitted such relief. Although the forms have been abolished, relief of that type is permitted under Rule 60b (6) Fed. R. Civ. P. In *Klapprott v. United States*, 335 U. S. 601, 614 (1949) Justice Black said:

> "In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

In this case the District Court might well have considered the fact that plaintiffs made a bona fide attempt to take an appeal from the judgment and order alleged to be erroneous. Two days before the time for appeal had expired plaintiffs mailed their notice of appeal to the District Court (R 44). In the normal course of the mails, the notice would have been delivered on Monday, January 8, 1952 (R 45).

The Clerk stated that he did not know whether the notice of appeal was received in the afternoon of that

day but he admitted that if it was delivered to the District Court's box on Monday afternoon it was not opened until Tuesday morning. In regard to the time the notice of appeal was delivered to the Clerk's office, the Clerk said: "In fact, there is hardly ever any mail in the afternoon and that is why we don't go down. But, if it did come in Monday afternoon, it was opened Tuesday" (R 41).

At 2:30 P.M. on Monday, January 8, 1951 three trains arrived from Portland and the mail was immediately distributed. The letter containing the notice of appeal may well have been and probably was contained in that delivery. Although it was not opened by the Clerk until the following morning, the notice would have been delivered by depositing it in the Clerk's box in time for it to be picked up during business hours. Delivery to the Clerk, not the mechanical act of stamping the papers, constitutes filing. *United States v. Adams*, 6 Wall. 101, 107 (73 U.S., 1868); *Baez v. People of Puerto Rico*, 82 F. 2d. 317, 321 (1st Cir. 1936); *J. D. Randall Co. v. Foglesong Machinery Co.*, 200 Fed. 741, 742 (6th Cir. 1912); *McCourt v. Singers-Bigger*, 150 Fed. 102, 104 (8th Cir. 1906).

These facts are pertinent not only to show that plaintiffs made an honest and sincere attempt to take an appeal which was defeated by the uncertainties of the

United States mails or the laxity of the Clerk's office, but also to show that plaintiffs have been diligent in asserting their rights and have continuously pressed for a proper decision upon their motion to remand.

The record, which is before this court in its entirety, shows that no finding of fraudulent joinder was, or could have been made. In the absence of fraudulent joinder there is no basis for the District Court's refusal to remand this case. Plaintiffs have diligently sought relief from the error created by the failure of the District Court to find the facts in this case and are entitled to a correct ruling upon their motion to remand. The case should, therefore, be remanded to the District Court with instructions to remand this cause to the state court from which it was improperly removed.

Respectfully submitted,

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